

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

VINCENT CLETUS PERKINS,

Defendant-Appellee.

UNPUBLISHED

March 1, 2002

No. 234275

Jackson Circuit Court

LC No. 00-04706-AR

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order which affirmed a district court order suppressing the results of a breath alcohol test performed after defendant was arrested for drunk driving. We reverse the circuit court's order and remand for further proceedings consistent with this opinion.

On May 29, 2000, defendant was arrested and charged with operating a vehicle while under the influence of liquor (OUIL), MCL 257.625(1)(a), and having an unlawful blood alcohol level (UBAL), MCL 257.625(1)(b). Defendant agreed to submit to a Breathalyzer test, and a state police trooper obtained a reading of .23 grams per 210 liters of breath, more than double the legal limit of .10 grams. MCL 257.625(1)(b). Before the officer could administer a second Breathalyzer test, he inadvertently broke the machine's mouthpiece. Therefore, the machine could not be used to administer a second test within the appropriate time frame. The officer did not request or administer any further tests.

Defendant moved in district court to suppress the single test result, arguing that it was inadmissible because the state trooper failed to comply with the administrative rules governing alcohol breath tests, 1999 AACRS, R 325.2655(1)(f). Following a hearing, the district court granted defendant's motion to suppress the evidence. The circuit court denied plaintiff's application for leave to appeal and affirmed the district court's suppression of the test result. This Court originally denied plaintiff's application for leave to appeal. *People v Perkins*, unpublished order of the Court of Appeals, entered February 5, 2001 (Docket No. 234275). However, our Supreme Court remanded the case, directing this Court to consider the appeal as on leave granted. *People v Perkins*, 464 Mich 853 (2001). Because we conclude that the

outcome of this case is controlled by this Court's opinion in *People v Fosnaugh*, 248 Mich App 444; ___ NW2d ___ (2001), we reverse the circuit court order and remand for further proceedings.¹

The Legislature has provided that a peace officer with "reasonable cause to believe" that a person is operating a vehicle on a public highway while under the influence of intoxicating liquor "may require the person to submit to a preliminary chemical breath analysis." MCL 257.625a(2). Further, the Legislature has provided the Department of State Police with authority to promulgate uniform rules for administering such chemical breath tests. MCL 257.625a(6)(g). One of the administrative rules adopted under that section provides, in pertinent part:

A second breath alcohol analysis shall be requested from the person being tested and administered, unless the person refuses to give the second sample or a substance is found in the person's mouth subsequent to the first test that could interfere with the test result. Obtaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in section 625c of Act No. 300 of the Public Acts of 1949, as amended, being § 257.625c of the Michigan Compiled Laws. The purpose of obtaining a second sample result is to confirm the result of the first sample. A second sample result shall not vary from the first sample result by more than the following values:

[Table omitted.]

If the variation is more than that allowed, a third breath sample shall be requested from the person being tested and a third result may be obtained. If the third result does not conform to the allowable variation of either of the first two tests . . . the person shall be requested to submit a blood or urine sample for analysis by an approved laboratory. [1999 AACCS, R 325.2655(1)(f).]

Defendant argues that the administrative rule required the state trooper to administer a second breath test and that the trooper's failure to do so requires suppression of the single test result. The district court agreed, finding that the officer's failure to perform a second breath test constituted "more than a technical violation" of the rule, and that suppression was the proper remedy. The prosecutor appeals by leave granted, arguing that the failure to obtain an additional test result should go to the weight of the first test result, not to its admissibility.

In *Fosnaugh, supra*, this Court considered a similar situation. In that case, the defendant was arrested and charged with OUIL/UBAL. *Id.* at 447. The defendant provided one breath sample which revealed a blood alcohol content of .18%. *Id.* Although the defendant submitted to the police officer's request for a second test, that test failed to provide a numerical reading, and indicated an invalid test result. *Id.*² No further tests were requested or administered by the police officer. *Id.* The district court granted the defendant's motion to suppress the results of the

¹ This Court issued its opinion in *Fosnaugh* after the parties submitted their appeal briefs in the present case.

² Apparently, the invalid test result was caused by the presence of mouth alcohol in the defendant's mouth.

single breath test because the officer had failed to obtain a second test result, in violation of R 325.2655(1)(f). *Id.* at 448. The circuit court denied leave to appeal from that decision. *Id.*

On appeal, this Court held that R 325.2655(1)(f) did not require suppression of the single test result:

The admission of chemical test results in a prosecution for OUIL/UBAL is authorized by MCL 257.625a(6). To be admissible, the test results must be both relevant and reliable. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999); *People v Campbell*, 236 Mich App 490, 504; 601 NW2d 114 (1999); *People v Wujkowski*, 230 Mich App 181, 186-187; 583 NW2d 257 (1998). Further, suppression of test results is required only when there is a deviation from the administrative rules that call into question the accuracy of the test. *Id.*

Here, there is no issue regarding the relevancy of the test; instead, we are faced with the reliability of the test. Both the district and circuit court ruled that the first test must be suppressed . . . because the reading from the first test of 0.18 percent was never confirmed by a second or third test as required by Rule 325.2655(1)(f). We conclude that these rulings were erroneous and that Rule 325.2655(1)(f) does not require suppression of the first test under the circumstances presented here. [*Id.* at 450.]

In the present case, plaintiff argues that a single test result is properly admissible, despite the officer's failure to obtain a second test result, given the following language contained in R 325.2655(1)(f): "[o]btaining the first sample is sufficient to meet the requirements for evidentiary purposes prescribed in section 625c of Act No. 300 of the Public Acts of 1949, as amended, being § 257.625c of the Michigan Compiled Laws." The *Fosnaugh* Court adopted this very analysis, concluding that "[t]he fact that a confirming test result was not obtained is relevant solely to the weight of the evidence," not to its admissibility. *Fosnaugh, supra* at 452.

Applying the *Fosnaugh* decision to the present case, we conclude that the district court erroneously suppressed the single breath test result, based solely on the police officer's failure to obtain a second breath test result. The existence of only one test result goes solely to the weight of the evidence, not to its admissibility.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski